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Federal Communications Commission
Office of Secretary

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February 28, 1997

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M St., NW
Washington, D.C. 20554

BY HAND

Re: MM Docket No. 95-176

Dear Mr. Caton:

On behalf of my client, the National Association of Collegiate Directors of Athletics, I hereby submit an original and four copies of Comments in MM Docket No. 95-176, relating to Closed Captioning of Video Programming.

Should you have any questions, please communicate directly with the undersigned.

Sincerely,


Philip R. Hochberg

enc.
05943.0002

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Closed Captioning and Video)
Description of Video Programming)
)
Implementation of Section 305 of)
the Telecommunications Act of 1996)
)
Video Programming Accessibility)

MM Docket No. 95-176

COMMENTS OF
NATIONAL ASSOCIATION OF COLLEGIATE
DIRECTORS OF ATHLETICS

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SUMMARY

The National Association of Collegiate Directors of Athletics ("NACDA") urges the Commission to adopt closed captioning regulations recognizing specific problems associated with collegiate sports: only programming on national television or national cable networks should be required to be closed captioned and that any captioning requirement go into effect at the end of the phase-in period.

Sports programming is already significantly "closed captioned" as a result of the live action and the graphics inherent in the programming itself.

Unique problems are created by mandating the closed captioning of sports programming, including: the lack of live captioners, the need for special skills for new live closed captioners, and the cost of live closed captioning, among others.

The Commission should also recognize the implications for college sports and its distribution systems. College athletic programs which will be called upon to support closed captioning generally are not financially successful. The sports that are now shown on Regional Sports Networks are new sports with a very small base of viewers. And the RSNs themselves, if faced with the need to caption, simply will not televise at all.

Finally, NACDA urges the Commission to place any sports captioning requirement at the end of the phase-in period.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

| | | |
|------------------------------------|---|----------------------|
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| |) | |
| Closed Captioning and Video |) | |
| Description of Video Programming |) | |
| |) | MM Docket No. 95-176 |
| Implementation of Section 305 of |) | |
| the Telecommunications Act of 1996 |) | |
| |) | |
| Video Programming Accessibility |) | |

**COMMENTS OF
NATIONAL ASSOCIATION OF COLLEGIATE
DIRECTORS OF ATHLETICS**

COMES NOW, the National Association of Collegiate Directors of Athletics ("NACDA") and files the instant Comments in the Notice of Proposed Rulemaking (MM Docket No. 95-176), adopted January 9, 1997.

NACDA is a non-profit association made up of more than 5000 individual members, representing some 1500 colleges and universities in the United States and Canada. Its membership covers both men's and women's athletic administrators at all levels of intercollegiate activity, including four-year and junior college institutions.

BACKGROUND

(a) Telecommunications Act of 1996

In the passage of the Telecommunications Act of 1996, Congress amended the Communications Act of 1934 to include a new

Section 713 dealing with Video Programming Accessibility. This section requires the Commission to adopt by August 8, 1997 rules dealing with closed captioning of video programs on the various forms of distribution, including broadcasting and cable television.

In passing Section 713, however, Congress recognized that certain exemptions of the closed captioning requirements would be permitted. So, for example, in Section 713(d)(1), Congress allowed that "classes of programs" could be exempted if providing closed captioning was determined to be "economically burdensome." Moreover, Congress in Section 713(d)(3) specifically recognized that a program owner could seek exemption

upon a showing that the requirements
contained in this section would result in an
undue burden.^{1/}

To that end, Congress identified the following for the Commission to consider in a seven-factor test to create exemptions:

^{1/} The Conference Report adopted the exact language of the House Report in stating that Section (d)(3) authorizes the Commission to grant additional exemptions, on a case-by-case basis, where providing closed captions would constitute an undue burden. In making such determinations, the Commission shall balance the need for closed captioned programming against the potential for hindering the production and distribution of programming.

H. Rep. Conference Report, Rep. No. 104-458, 104th Cong., 2d Sess. 183 (1995).

- (1) the nature and cost of the closed captions for the programming;
- (2) the impact on the operations of the program owner;
- (3) the financial resources of the program owner and the financial impact;
- (4) the cost of captioning, considering the relative size of the market served or the audience share;
- (5) the cost of captioning, considering whether the program is local or regional;
- (6) the non-profit status of the provider; and
- (7) the existence of alternative means of providing access to the hearing-impaired. ^{2/}

(b) **Notice of Inquiry**

Pursuant to its statutory mandate, the Commission adopted a Notice of Inquiry on December 1, 1995. In that proceeding, only a handful of comments were filed dealing with sports programming, leaving the Commission with less than a full record upon which to base its Notice of Proposed Rulemaking.

(c) **Notice of Proposed Rulemaking**

In its Notice of Proposed Rulemaking, the Commission noted that a "variety of technical issues" were raised against captioning sports, but concluded simply that "we observe that much national sports programming is captioned," citing as its only example the real-time captioning of the 1995 and 1996 NCAA Men's Basketball Championships. ^{3/}

In its section dealing with exemptions based on economic burdens, the Commission stated its belief that neither all sports

^{2/} Ibid.

^{3/} Notice of Proposed Rulemaking in MM Docket No. 95-176 at Para. 66.

programming nor all local sports programming should be exempted, specifically citing "major league sports teams" with large production budgets and large audiences. The Commission then added:

There may be, however, types of sports programming for which a closed captioning requirement would be burdensome, such as locally produced college ... sports. Should those types of sports programming for which closed captioning would be economically burdensome fall under our general exemptions?^{4/}

The Commission then added a second issue:

In addition, we seek comment on whether there are alternatives to a closed captioning requirement for ... [sports] programming, e.g., presentation of the basic information in textual or graphical form, that would be less burdensome than a closed captioning requirement.^{5/}

ARGUMENT

(a) College Sports Programming Is Already "Captioned" through the Nature of the Programming and through Extensive Use of Graphics

Sports programming, be it national, regional, or local, be it television, cable, or wireless, is unique programming. It is the one type of television programming that "speaks for itself" through action on the screen, as shown by viewing of a televised

^{4/} Id. at Para. 84.

^{5/} Ibid.

sports event in a social or a commercial (e.g., restaurant or bar) setting, where the sound, even if turned up, is not necessary to follow the action.

Even beyond the action speaking for itself, there has been a dramatic increase in the use of graphics in sports telecasts. In fact, the Conference Committee noted that the "existence of alternative means of providing access to the hearing impaired" was one factor to be considered in establishing an exemption. And the Commission, in the Notice of Proposed Rulemaking, suggests that extensive use of on-air textual information may be sufficient.

In fact, more and more information is being communicated on sports telecasts. As many as 65-70% of the shots in a college basketball game have a graphic element added to them. These are, for example:

- Introduction of the starting lineups;
- Coaches and officials;
- Conference or league records and standings;
- Institutional and conference promotions;
- Score after every basket;
- Score at every time out;
- Clock after every basket;
- Shot-clock as it gets below 10 seconds;
- Clock (with time in tenths of a second) in the last minute of each half;
- Individual scoring totals when a player is at the foul line;
- Individual foul shooting totals when a player is at the foul line;
- Personal fouls and team fouls;
- Half-time statistics;
- Final statistics;

Game summaries. ^{6/}

As the games in all sports get more statistically oriented, more creative and more sophisticated graphics are being used in telecasts and cablecasts. So, for instance, many providers are now using a "bug" in football telecasts, showing, on a running, real-time basis, the score, quarter and time left.

When considered with the others factors dealing with college sports telecasting and cablecasting, the Commission should specifically exempt these transmissions as already satisfying the statutory mandate.

(b) Additional Captioning of Sports Programming Creates Unique Problems

At the same time that sports programming is becoming more and more graphics- and text-oriented, the proposal for captioning of live sports events raises additional problems, unique to sports. For example, the Commission has noted the significant problems of real-time captioning: the lack of captioners available; the necessity of new captioning skills, not required in captioning of taped or filmed programs; the cost; and the geographic disbursement of existing live captioners. All of these problems obviously are a significant part of the reasons

^{6/} Conference with Chris Glass, Producer, Home Team Sports, February 19, 1997.

why the only network programs not completely captioned have been the regionalized telecasts of sports events.

- Lack of live captioners. The Commission has recognized a lack of captioners skilled to do closed captioning. In Comments in the Notice of Inquiry, ABC pointed out that there were not enough live captioners to handle even the weekend regionalized sports schedules of the national networks. ^{7/} And now the Commission would consider quintupling that number of games in a week by including all college games. Whereas there are 100 suppliers of closed captioning services, the Commission quotes one commenter as saying there are "only about 100 real time [live] captioners nationwide today." ^{8/} On a heavy sports evening therefore, one-half of the entire universe of live captioners could be working more than twenty games of the National Basketball Association and National Hockey League alone, each with a different audio for the home and away audiences. And this would not even take into account other captioning needs -- professional and collegiate -- of that particular day.

- Special skills are needed for live captioning. Whereas captioners can virtually work at their own speed for non-live programs as they increase their skills, live sports programs require captioners with immediate skills and indeed knowledge of

^{7/} Comments of ABC, Inc. in Notice of Inquiry at 6.

^{8/} Supra note 3 at Para. 24.

the games that are being played. ^{9/} For the foreseeable future, the universe of live captioners simply won't exist.

● Cost of captioners. The cost of live captioners -- estimated to run as much as \$1200 an hour ^{10/}-- can increase production budgets for a two-hour college basketball telecast by as much as 25%! As stated by The CPB-WGBH National Center for Accessible Media, that \$1200 per hour cost is affected by

the volume of work, the time of day of the broadcast, its length, the complexity of preparation, the means of access to the TV signal (via satellite, cable or phone), the required level of technical and staff back-up, and the need for archived and/or cleaned-up data for additional transmission. ^{11/}

Although the National Center did not break down the costs in its Comments, every single consideration would be exacerbated by an across-the-board requirement for the captioning of collegiate telecasts and cablecasts.

NACDA also points out to the Commission the (admittedly, one-time) cost of both the hardware and software, which could run as much as \$25,000 more.

^{9/} Captioning of live events is far different than the usual captioning for local newscasts, for example, where technology allows captioning to be done as scripts are prepared.

^{10/} See supra note 3, at Para. 24.

^{11/} Comments of CPB-WGBH National Center at 19. In addition, the Comments of the A&E support the \$1200 figure for live captioning. See Comments of A&E Television Networks at 15.

Even if the captioning costs only half of that amount, there will be a tremendous increase in the production costs of college telecasts and cablecasts. This cost will run right to the bottom line of the production. And the cost will remain the same without regard to whether the event has a large or small audience size.

- Logistical problems of live captioners. Live captioners are spread all over the country. It would take an elaborate mechanism of either providing a special feed to them and a return feed or a grouping of them in specific geographical locations to provide the necessary coordination. It may be one logistical problem to overcome with a single game or even a single series of games ^{12/}, but the Commission is considering a requirement of every telecast, every sport.

- Lack of residual uses of live sports programming. With taped or filmed programs, the cost of captioning programs can be amortized over repeated airings; this obviously is not the case with sports telecasts. ^{13/}

- Captioning of live sports may interfere with sports telecast. Moreover, the captioning of a sports event could

^{12/} Such as the NCAA Championships which take place over a concentrated three-weekend period.

^{13/} Any repeat airings presently are same-day, akin to time-shifting, and offering no true residual value so as to amortize costs.

result in a self-defeating exercise. Unlike any other television programming, the action of a sports telecast is continuing. The delay of a few seconds in captioning will mean the picture and the live action will be completely out of synch. In addition, it is quite possible that the captioning on the screen will either cover the graphics used during the broadcast or, if moved to a different part of the screen, would actually cover the live action.

(c) **College Sports**

The Commission notes only one example of collegiate telecasting in the Notice of Proposed Rulemaking. It cites the experience of CBS in closed captioning all 63 games of the NCAA National Basketball Championships in 1994 and 1995. The FCC points to those as examples of captioning of a major network event. Indeed, the captioning of a major event with multiple regionally-distributed games, many of which took place at the same time, was an extraordinary effort, but hardly reflective of the college sports marketplace.

The Commission should draw some very bright lines -- based on reality -- as to what should or should not be closed captioned. The absence of these reality-based "bright lines" will signal the removal of events from the particular carriers.

(1) **The economics of college sports telecasting will not support closed captioning**

The Commission must recognize that, as a vast general rule, neither the institution (nor the carrier) makes any significant profit out of a college telecast. Schools nonetheless are eager to have their events aired. It is not at all unusual for an institution even to pick up all production costs and sometimes even pay a rights fee to obtain air time. There are institutional benefits that flow to the school, such as recruiting and institutional promotion to the community at large or to alumni groups.

Congress directed the Commission to consider the non-profit status of the program provider. College athletic programs fit that status. In fact, a recent study has shown that few college sports programs are financially successful.^{14/} In this case, the ultimate provider is in fact the non-profit educational institution which will bear the ultimate financial responsibility for the closed captioning -- by paying the cost of the captioner, by having its rights fees reduced to pay for the captioner, or, worst, by having the television or cable distributor simply

^{14/} See Sheehan, Keeping Score: The Economics of Big-Time Sports (Diamond Communications, 1996).

refuse to carry the game as a result of the increased production costs. ^{15/}

There are nearly 1300 Division I, II, and III four-year institutions playing intercollegiate athletics in the National Collegiate Athletic Association (NCAA) and the National Association of Intercollegiate Athletics (NAIA). It is NACDA's belief that there are at least 3000 local and regional telecasts and cablecasts each year on local stations and on Regional Sports Networks. At an average of \$2000 per game, this means the college community would pay some six million dollars a year for closed captioning; even at a lesser captioning per hour figure, the cost is daunting for the vast majority of sports telecasts and cablecasts.

The vast majority of these costs would be allocated to sports and schools and conferences that would not be able to afford to pay them.

^{15/} So, for example, in order to obtain cable coverage of one of the most important local basketball games in the Washington area, Maryland versus George Washington on December 9, 1996, the sponsoring entity, the Children's Charity Foundation, had to agree to cover \$5000 in production costs. Conference with Robert Zurfluh, Tournament Director, February 11, 1997.

- (2) "Supplementary Sports" are only starting to be shown and the burden of captioning will remove them from the air

In recent years, due to the proliferation of distribution channels and the changing nature of collegiate sports due to Title IX of the Educational Amendments of 1972, many new sports - especially women's sports ^{16/} -- have begun being shown by various video providers. For example, one Regional Sports Network showed 25 women's basketball games during the month of February, 1997 alone. ^{17/} In addition to the traditional Division I-A Football and Division I Men's Basketball, some of the other sports which now appear include:

- Baseball
- Cross Country
- Field Hockey
- Golf
- Gymnastics
- Ice Hockey
- Lacrosse
- Rugby
- Soccer
- Softball
- Swimming and Diving
- Tennis
- Track and Field
- Volleyball
- Wrestling

^{16/} See Business Week, March 3, 1997, at 54.

^{17/} Home Team Sports Program Guide, February, 1997. Moreover, HTS showed an additional 37 men's games during that same month. HTS also showed same-day repeats of 36 men's and women's games. And in one nine-day period in March, 1996, HTS showed 37(!) men's and women's college basketball playoff games.

These sports, often termed "non-revenue" sports in the collegiate field, in recent years have enjoyed exposure for the first time. However, viewership for them remains small. In many cases, colleges and conferences must assume responsibility for the production of telecasts and cablecasts, since the airing is not economically justifiable. Just when these sports are starting to get on the air, they will be denied that air-time, not by the marketplace, but by Commission-imposed regulations.

Moreover, the application of the closed captioning rules will exacerbate the growing problem in the college community of dropping sports in recent years because of budgetary constraints.^{18/} Sports which might have been able to get on the air and begin to develop a following will not even have the opportunity.

(3) **"Supplementary Distribution Systems" cannot afford closed captioning**

The Commission should also note the distribution systems that carry the sports. While national television and national

^{18/} In the past fifteen years, more than a third of universities that once offered men's wrestling have dropped the sport, as have 55% of those offering men's gymnastics. Chronicle of Higher Education, Feb. 21, 1997, at A39.

cable should not be excluded from the requirements, ^{19/} all local and regional forms of distribution in fact should be excluded.

College telecasting provides needed programming hours, especially for the Regional Sports Networks, without any substantial monetary return. So, for example, if a RSN, carrying a women's soccer game produced for \$8000 for the two hour telecast, is faced with the need to increase that production budget by \$1000 an hour -- or even \$500 an hour -- for live closed captioning, its response is going to be clear -- and easy to make: it will refuse to produce the game.

Innovative program distribution patterns have developed which could come to a halt with the imposition of the significant new production costs of closed captioning. For example, Time Warner has just begun a 24-hour local sports network producing live high school and small college games in Missouri. Metro Sports is one of the few RSNs that is not supported by major league professional sports teams. ^{20/} Without the "anchor" of a major league such an ambitious effort might be doomed to failure if its production budget will be increased by as much as 20%.

^{19/} It is NACDA's understanding that the National Collegiate Athletic Association is taking the position that any event sold to a national television or national cable network -- without regard to the sport involved -- should be subject to the closed captioning requirement.

^{20/} Multichannel News, February 3, 1997, at 6.

Failure to exclude these non-national television and cable systems will lead to much local distribution coming to an end. A local television station carrying a schedule of local Division II Basketball games will not create an entirely new closed captioning mechanism -- with all of the attendant expense -- simply to carry those games. It will instead walk away from carrying the package. And no one will win -- not the hearing impaired community, not the institution or its athletes, and not the viewers.

The same will be true of the Regional Sports Networks. While the exposure of collegiate sports is aggressively sought by institutions and conferences, the collegiate interests recognize that they are often material used to supplement the packages of the local professional teams. (In fact, time often must be purchased on the RSN to air the games. ^{21/}) Like the local television stations, the RSNs too will refuse to carry live packages of local collegiate teams and conferences, preferring instead "canned" programs, especially of library materials. The result here will be even more dramatic than with over-the-air television, since so many more of the "supplementary sports" have gained new exposure on regional networks.

The Commission should limit the application of the new rules to the national networks.

^{21/} See supra note 14.

(d) Because of its Unique Telecasting Characteristics, the Commission Should Specifically Place Sports Programming at the End of the Phase-In Period.

The Commission has recognized that it is not "practical to mandate immediate captioning of all non-exempt video programming." It has provided two alternative phase-in proposals, one for eight years and one for ten years. ^{22/}

Perhaps unique among all television programming, sports programming does not need to be captioned. ^{23/} Nonetheless, live sports programming would be subject to the same marketplace forces as any other programming. By recognizing the fact that sports programming is already significantly available to the hearing-impaired and, by rule, indicating that sports programming need not be closed captioned until the end of the phase-in period, scarce resources can be devoted to other programming. Live captioners, for example, can be used on news or public interest programming, rather than to add to the already substantially-conforming sports programming.

If in fact the Commission can consider requiring an "earlier implementation schedule" ^{24/} for such programming as local news and public affairs, then it certainly can recognize that other

^{22/} Supra note 3 at Para. 40.

^{23/} See text accompanying supra note 6-12.

^{24/} Supra note 3 at Para. 42.

programming, such as sports, might warrant a "later implementation schedule" and set it at the end of the phase-in period.

PROPOSAL

As well-intentioned as the closed captioning requirements are, the net effect will have ramifications far beyond captioning itself. As a result of the requirement of closed captioning, events will not be shown at all. The "tail" of closed captioning will have "wagged the dog" of collegiate sports distribution.

The Commission should not find itself trying to microexamine which collegiate basketball contract, for example, might generate income sufficient enough to cover the cost of captioning that and other men's or women's sports. Rather, the FCC, recognizing the unique aspects of both collegiate sports and the telecasting and cablecasting of collegiate sports, should create a broad exemption.

NACDA urges the Commission to adopt a two-pronged proposal in dealing with collegiate sports:

(a) No collegiate sports programs aired on distribution systems other than national systems (e.g., national television networks and national cable networks) should be subject to the closed captioning rules; and

(b) Any collegiate sports programs which in fact is subject to the closed captioning rules should not be required to be captioned until the end of whatever phase-in period is adopted.

Respectfully Submitted,

NATIONAL ASSOCIATION OF COLLEGIATE
DIRECTORS OF ATHLETICS


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